

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

The Hill of Portsmouth  
Condominium Association,  
Plaintiff

v.

Civil No. 04-cv-403-SM  
Opinion No. 2006 DNH 064

Parade Office, LLC,  
Parade Hotel, LLC, and  
Parade Residential, LLC,  
Defendants

**O R D E R**

The Hill of Portsmouth Condominium Association (the "Association") brings this action seeking a judicial declaration that its members hold an enforceable easement for parking and other purposes on property owned by defendants, Parade Office, LLC, Parade Hotel, LLC, and Parade Residential, LLC (collectively, "Parade Office"). Parade Office objects, claiming the easement was extinguished when the prior owner of the dominant tenement conveyed that property to the Association's members, without the benefit of the parking easement. Alternatively, Parade Office says the very terms of the easement allow it (the owner of the servient tenement) to use the land encumbered by the parking easement to the exclusion of the dominant tenement (i.e., the Association). The parties have

filed opposing motions for summary judgment, each claiming entitlement to judgment as a matter of law.

### **Standard of Review**

When ruling on a party's motion for summary judgment, the court must "view the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor." Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990). Summary judgment is appropriate when the record reveals "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In this context, "a fact is 'material' if it potentially affects the outcome of the suit and a dispute over it is 'genuine' if the parties' positions on the issue are supported by conflicting evidence." Intern'l Ass'n of Machinists and Aerospace Workers v. Winship Green Nursing Ctr., 103 F.3d 196, 199-200 (1st Cir. 1996) (citations omitted).

### **Background**

The Association and Parade Office own adjacent parcels of land in Portsmouth, New Hampshire. Prior to the events giving rise to this litigation, Barnett Mortgage Trust owned both properties as a single parcel. In 1997, Barnett subdivided the

property and submitted what is now the Hill of Portsmouth Condominium to the provisions of New Hampshire's Condominium Act, N.H. Rev. Stat. Ann. ("RSA") ch. 356-B, by recording in the registry of deeds a declaration of condominium. Subsequently, Barnett created a parking easement on the adjacent parcel for the benefit of the condominium property. The "Declaration of Easement" recorded in the registry of deeds describes the condominium property as the dominant tenement (i.e., the property benefitted by the easement) and the adjacent property as the servient tenement (i.e., the property burdened by the easement). Subsequently, Parade Office purchased the servient tenement, which is now known as the Parade Mall property. There is no dispute that Parade Office took title to that parcel of land subject to the condominium property's parking easement.<sup>1</sup>

In 2000, Makrie LLC acquired the condominium property by warranty deed, which specifically identified and included the parking easement. The deed to Makrie also provided that the property was subject to the previously recorded declaration of condominium (each of Makrie's predecessors in title also took the

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<sup>1</sup> After this litigation was filed, Parade Office conveyed portions of the Parade Mall property to Parade Hotel and Parade Residential. Consequently, three entities now own portions of the Parade Mall property.

property with the benefit of the easement, and subject to the declaration of condominium).

By early 2001, no units had been sold at The Hill of Portsmouth Condominium. At that time, Makrie, as the sole title holder of the property, amended the condominium declaration by recording a "Restated and Amended Condominium Declaration." Although the metes and bounds description of the property submitted to the amended declaration of condominium is identical to that describing the parcel submitted to the original declaration of condominium, the amended declaration does not make any reference to the parking easement. Instead, it describes the property as being "a portion" of the property to which Makrie originally took title - presumably, an oblique reference to the missing description of the parking easement.

Makrie also amended the condominium documents to include, as a common expense to be borne by all unit owners, "parking lease payments" - payments to be made by unit owners to Makrie for the privilege of using the parking area covered by the easement. Finally, Makrie recorded a revised site plan which included a revision note that stated: "remove parking easement & note parking encroachment per attorney request."

It is apparent that Makrie purposefully omitted any reference to the parking easement from the conveyance of land into the condominium. Perhaps Makrie thought (erroneously) that by simply amending the declaration of condominium and omitting any references to the easement, it could sever the easement from the dominant estate and retain independent "title" to the easement, despite the fact that it no longer held title to the dominant estate. And, it appears that, at least for awhile, the Association did not question Makrie's free-standing "ownership" of the easement or its right to charge condominium unit owners a fee for parking on land owned not by Makrie, but by Parade Office.

Eventually, Parade Office filed a petition for declaratory judgment in state court, asserting that the parking easement was extinguished when Makrie purposefully excluded any reference to it from the restated and amended declaration of condominium. Parade Office sought a judicial declaration that Makrie had no legal or equitable interest in Parade's property. Neither the Association nor any of its members were party to that proceeding.

The state trial court agreed with Parade Office, concluding that:

When [Makrie] resubmitted the property to condominium, . . . it purposely excluded the parking easement from the Hill property. . . . Thus, [Makrie] severed the easement from the dominant tenement and attempted to retain the easement for itself.

However, an easement appurtenant cannot exist separate from the dominant tenement. [Makrie] no longer owns the Hill property, having sold all of the condominium units. Therefore, the court finds respondent extinguished the parking easement when it excluded it from the Amended Condominium Declaration and subsequently sold all of the condominium units.

Parade Offices, LLC v. Makrie, LLC, 03-E-0449, slip op. at 2-3 (N.H. Super. Ct. Feb. 23, 2004) (emphasis supplied). Makrie appealed the Superior Court's decision to the New Hampshire Supreme Court.

In connection with that appeal, the Association sought (and was granted) permission to file an amicus brief. In its brief, the Association asserted that it did "not seek a resolution of its members' claim to the parking easement." Rather, said the Association, the purpose of its brief was "to protect against any such resolution by demonstrating that certain 'extinguishment' language in the Superior Court's decision was unnecessary dicta and, further, that the Superior Court could not properly have resolved the claimed interest of non-parties (the Association's members)." In other words, the Association asserted that the

state trial court went too far in concluding that Makrie “extinguished” the parking easement (thereby prejudicing the Association’s claim to the benefits of that easement). Instead, said the Association, the trial court should have limited its ruling with respect to Parade Office, holding only that Makrie had no enforceable interest in that portion of Parade Office’s property subject to the parking easement.

The New Hampshire Supreme Court agreed. In affirming the lower court’s decision, the Supreme Court noted that “a dominant tenement’s interest in an easement cannot be severed from the land by transferring the land while attempting to retain the easement.” Parade Offices, LLC v. Makrie, LLC, No. 2004-0332 (N.H. Sup. Ct. March 15, 2005). Importantly, however, the court specifically avoided resolving the issue presented in this case: whether the parking easement was extinguished when Makrie omitted any reference to it from the restated condominium declaration. Id. (“We need not decide whether the parking easement was extinguished. Indeed, as noted in its amicus brief, the current unit owners’ association, which is not a party to this case, claims an interest in the parking easement.”).

As amended, the "Declaration of Easement" at issue in this case actually created two easements - an access easement and a parking easement - each benefitting what is now the Association's property and each burdening what is now Parade Office's property:

NOW THEREFORE, the said Barnett Mortgage Trust does hereby create a perpetual easement over, upon, and through, said servient tenement for the following uses and purposes:

To provide a means of ingress and egress by foot and vehicle traffic on and over the said servient tenement to and from the dominant tenement in favor of the owners of the dominant tenement, their heirs and assigns forever. . . . .

FURTHER, the said Barnett Mortgage Trust does hereby create an easement in favor of the owners of the dominant tenement, their heirs and assigns forever, for the purpose of parking in or on an area located in the southeasterly portion of the servient tenement bounded and described as follows . . . . .

As consideration for this easement, the owner of the above named dominant tenement does hereby agree for itself, its heirs and assigns forever (during the existence of this easement), to make annual payments to the owner of the servient tenement for its (dominant tenement's) proportionate share of the cost [of maintaining the parking area]. It is further expressly understood that this easement is an easement in common with the owner of the servient tenement, its heirs and assigns forever, and that the owner of the dominant tenement, its heirs and assigns, shall have no right to interfere with the owner of the servient tenement's use of this parking area but shall have the option to terminate this parking easement unilaterally at any time.

Exhibit A-2 to defendant's motion for summary judgment.



### **Discussion**

When Makrie submitted the Association's property to the restated declaration of condominium, it is clear that:

1. Makrie intended that the Association's property no longer retain the benefit of the parking easement - that is, Makrie purposefully omitted any reference to the easement when it submitted the property to the restated declaration of condominium in an effort to sever the easement from the dominant estate; and
2. Makrie did not intend to extinguish the easement; instead, it sought to preserve the existence of the easement and retain independent "title" to it (the latter effort - to retain ownership of the easement - now having been declared unsuccessful by the New Hampshire Supreme Court).

In this case, the parties seize upon those two conflicting intentions/efforts: Parade Office, naturally, focuses on the former and asserts that, consistent with Makrie's efforts, the easement was successfully severed from the dominant estate, did not pass to the Association's members when Makrie recorded the restated condominium declaration without any reference to the easement, and, so, was extinguished. The Association, on the other hand, focuses on the latter of Makrie's efforts, saying Makrie never intended (nor did it take the necessary and proper steps) to either terminate the easement (under its terms) or

extinguish the easement as a matter of law. And, says the Association, because Makrie plainly could not retain independent "title" to the easement, its efforts to sever the easement from the dominant estate were ineffectual and the easement simply passed along with the dominant estate into the restated condominium.

I. The Parking Easement was not Extinguished.

The parties to this diversity action agree that New Hampshire's property law governs the resolution of their dispute. The principal legal question presented is this: whether, when a dominant estate (one benefitted by an easement) is conveyed without any reference to that easement, the easement is implicitly extinguished or whether the easement still passes, by operation of law, through the chain of title to the new property owner.

In the related state court proceeding between Makrie and Parade Office, the New Hampshire Supreme Court noted that the parking easement at issue here is an appurtenant easement.<sup>2</sup> As

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<sup>2</sup> For a discussion of the distinction between an "appurtenant easement" and an "easement in gross," see Arcidi v. Town of Rye, 150 N.H. 694, 698 (2004). For a discussion of the distinction between an "easement" and a "license," see Waterville

such, it is incapable of existence apart from the dominant estate. See Arcidi v. Town of Rye, 150 N.H. 694, 699 (2004). In other words, the owner of the dominant estate cannot transfer just the easement to a third party, see Cricklewood on the Bellamy Condo. Ass'n v. Cricklewood on the Bellamy Trust, 147 N.H. 733, 737 (2002), nor can the owner transfer the dominant estate itself while trying (as did Makrie) to retain independent title to or ownership of the easement, see Parade Offices, LLC v. Makrie, LLC, No. 2004-0332 (N.H. Sup. Ct. March 15, 2005).

It is equally well-settled that when a dominant estate is conveyed without any reference to the easements benefitting that estate, those easements are necessarily transferred along with the dominant estate by operation of law. New Hampshire statutory provisions make this clear:

**Easements, Appurtenances, etc.** In a conveyance of real estate or any interest therein, all rights, easements, privileges and appurtenances belonging to the granted estate or interest shall be deemed to be included in the conveyance, unless the contrary shall be stated in the deed, and it shall be unnecessary in order for their inclusion to enumerate or mention them either generally or specifically.

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Estates Ass'n v. Town of Campton, 122 N.H. 506, 508-09 (1982).

RSA 477:26 (emphasis supplied). That statute is entirely consistent with New Hampshire common law, which has long provided that "when an easement has become appurtenant to a dominant estate, a conveyance of that estate carries with it the easement belonging to it, whether mentioned in the deed or not."

Spaulding v. Abbot, 55 N.H. 423, 424-25 (1875). See also Downing House Realty v. Hampe, 127 N.H. 92, 95 (1985) (noting that the courts will find that an easement has been abandoned only if the holder of the easement undertakes "clear, unequivocal and decisive acts" to evidence that intent). See generally Restatement (Third) Property Servitudes (2000) § 5.6 ("[A]n appurtenant benefit may not be severed and transferred separately from all or part of the benefited property. An attempted severance that is not effective to transfer the benefit does not extinguish the benefit unless manifestly intended to do so.").

In other words, New Hampshire's law, like the Restatement, disfavors the implicit extinguishment or abandonment of easements and its courts will not infer that an easement has been either extinguished or abandoned absent express and unmistakable conduct aimed at achieving that goal.

In this case, when Makrie subjected the dominant estate to the restated and amended declaration of condominium, none of the relevant instruments made reference to the parking easement. Necessarily, then, none of those instruments expressly stated any intention on the part of Makrie to extinguish the easement. In fact, as Parade Office concedes, Makrie specifically intended that the easement continue. Consequently, the easement was, as a matter of law, included in the chain of title when the Association's property was submitted to the restated declaration of condominium, notwithstanding Makrie's erroneous belief that it could retain freestanding "title" to it by not specifically referring to it in the restated declaration of condominium. See RSA 477:26 (requiring the deed to expressly state an intention to extinguish any appurtenant easements if that is the grantor's intent). That is to say, Makrie's ineffective efforts to retain control over the easement did not serve to extinguish the easement. Instead, the easement simply passed (albeit silently and by operation of law) to the members of the Association, as owners in common of the dominant estate.

## II. Parade Office's Use of the Servient Estate.

Even if Makrie's efforts to retain the benefit of the easement for its own uses did not serve to extinguish the

easement, Parade Office says it still retained the authority to unilaterally extinguish the parking easement by dedicating the area covered by the easement to a different use:

The creator of the easement fashioned the dominant tenement's parking rights as being subject to the servient tenement's "use of the parking area." Such use has in fact occurred with the construction of the hotel and condominium on the parking easement area. This use was contemplated by the creator of the easement. The language is clear and unambiguous. "The owner of the dominant tenement shall have no right to interfere with the owner of the servient tenement's use of this parking area."

. . . The drafter clearly intended the dominant tenement to have parking in common with the servient tenement until such time as the servient tenement had a use for the parking area.

Defendant's motion for summary judgment (document no. 22-2) at 18. Applying that reasoning, Parade Office concludes that:

The circumstances surrounding the creation of the easement lead to the conclusion that the creator of the parking easement did not want to limit its later use of the easement area to just parking. The parking easement, if not earlier extinguished, was certainly lawfully used by the servient tenant to construct a hotel and residential condominium. This ended the easement's existence.

Id. at 21 (emphasis supplied). The court disagrees.

The portion of the easement's description that is central to Parade Office's argument provides:

It is further expressly understood that this easement is an easement in common with the owner of the servient tenement, its heirs and assigns forever, and that the owner of the dominant tenement, its heirs and assigns, shall have no right to interfere with the owner of the servient tenements use of the parking area but shall have the option to terminate this parking easement unilaterally at any time.

Exhibit A-2 to defendant's motion for summary judgment (emphasis supplied).

Construing language employed to establish an easement presents, generally speaking, a question of law for the court to resolve.

We will apply the general rules of contract interpretation to the interpretation of the easement agreement. As a general rule, the proper interpretation of a contract is ultimately a question of law for this court, and we will determine the meaning of the contract based on the meaning that would be attached to it by reasonable persons. When interpreting a contract, absent fraud, duress, mutual mistake, or ambiguity, the parties' intent will be determined from the plain meaning of the language used in the contract.

Close v. Fisette, 146 N.H. 480, 484 (2001) (citations and internal punctuation omitted). See also Lussier v. New England Power Co., 133 N.H. 753, 756 (1990) ("The beginning and end of

our inquiry is found in the words of the easement deeds. Our task is to determine the parties' intent in light of the surrounding circumstances at the time the easements were granted.") (citation omitted and emphasis supplied).

Here, the language of the parking easement is plainly inconsistent with Parade Office's view that it could, in essence, unilaterally terminate the easement by simply putting the affected parcel to a use inconsistent with parking (by, for example, erecting a structure there). First, the power to unilaterally terminate the easement was granted to the dominant tenement, not the servient. The reason for that is clear: as it was originally drafted, the easement obligated the dominant tenement to make annual payments to the owner of the servient tenement for its proportionate share of the costs associated with maintaining the parking area, but in no event was that amount to be less than \$1,000 each year. Consequently, if the owner of the dominant tenement determined that it no longer needed to use the parking easement, it would, absent the right to terminate the easement, still be obligated to pay at least \$1,000 each year to the owner of the servient tenement.<sup>3</sup> Plainly, the drafters of

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<sup>3</sup> When the parking easement was amended in 1977, the reference to the minimum annual payment of \$1,000 was removed.



the easement anticipated the possibility that the dominant tenement might eventually no longer need (or want to pay for) the benefit of the parking easement and, therefore, crafted a means by which it might terminate the easement and avoid making annual payments for a benefit it no longer needed or enjoyed.

Second, Parade Office reads too much into the language that provides the owner of the dominant tenement "shall have no right to interfere with the owner of the servient tenement's use of this parking area." By referring to the easement as an "easement in common with the owner of the servient tenement," its drafters contemplated that both the dominant tenement and servient tenement would share rights to use the parking area for parking, with neither unreasonably interfering with the other's enjoyment of it as such - that is, a parking area. The language does not reasonably lend itself to Parade Office's expansive view that, as holder of the servient estate, it could put the land encumbered by the parking easement to any inconsistent use it pleased and, in so doing, wholly divest the holder of the dominant tenement of the benefit of the easement. See Waterville Estates, 122 N.H. at 509 ("Although it may be released or abandoned by the owner of

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The ability of the dominant estate to unilaterally terminate the easement was, however, retained.

the dominant estate, the easement appurtenant is not terminable at the will of the owner of the servient estate.") (citations omitted).

As the owner of the servient estate, Parade Office does not have the right or authority to put the affected property to a use that is inconsistent with the Association's parking rights. See, e.g., Dumont v. Town of Wolfeboro, 137 N.H. 1, 6 (1993) ("The owner of a servient estate has the privilege to use the land affected by an easement to the extent that his or her use does not impair the dominant tenant's right of way.") Bean v. Coleman, 44 N.H. 539, 544 (1863) ("[T]here remains with the [servient estate holder] the right of full dominion and use of the land, except so far as a limitation of his right is essential to the fair enjoyment of the right of way which he has granted."); Bartlett v. Peaslee, 20 N.H. 547, 549 (1847) ("[T]he grant of a water-course implies a covenant by the grantor not to disturb the grantee in the enjoyment of it.").

Notwithstanding Parade Office's arguments to the contrary, the specific language of the easement does not vest the owner of the servient tenement with any greater rights (or obligations) than those provided by New Hampshire common law. Had the

drafters of the easement intended to vest the owner of the servient estate with the powers envisioned by Parade Office, they would have written the easement as something more akin to a license and given both parties the right to terminate it at will, rather than granting that authority exclusively to the holder of the dominant estate.

Accordingly, the court concludes that Parade Office, as holder of the servient estate, cannot put the encumbered land to any use that is inconsistent with the Association's parking rights (absent, of course, the Association's consent). Instead, as contemplated by the language of the easement itself, both Parade Office and the Association have the right to use the encumbered land as a parking area, with neither unreasonably interfering with the other's use of that area for parking. See generally Sakansky v. Wein, 86 N.H. 337, 339-40 (discussing the "rule of reason" as applied to easements and noting that the "rule merely refuses to give unreasonable rights, or to impose unreasonable burdens, when the parties, either actually or by legal implication, have spoken generally."); Dumont, 137 N.H. at 7 (observing that "Sakansky concerned a useful easement, whose use the owners of the servient estate threatened to impair; the

ruling preserved the dominant tenant's right to continue using an express easement for a reasonable purpose.").

### **Conclusion**

For the foregoing reasons, the court concludes that the parking easement at issue in this case was not extinguished by Makrie's futile effort to sever it from the dominant tenement and retain independent title to it. Instead, the rights conferred by the easement passed by operation of law to the Association's members, as tenants in common of the dominant tenement. Moreover, the court rejects Parade Office's contention that it possesses unilateral authority to terminate the easement by putting the encumbered land to a use that effectively eliminates or substantially reduces the benefit of the Association's parking easement. The Association, like Parade Office, has the right to make reasonable use of the encumbered land as a parking area, with neither party unreasonably interfering with the parking rights of the other.

Parade Office's motion for summary judgment (document no. 22) is denied, as is its motion to strike (document no. 24). The Association's motion for summary judgment (document no. 23) is

granted. The Clerk of Court shall enter judgment in accordance with this order and close the case.

**SO ORDERED.**

  
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Steven J. McAuliffe  
Chief Judge

June 12, 2006

cc: Timothy A. Gudas, Esq.  
Paul McEachern, Esq.